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No. 06-57

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SUPREME COURT

IN THE

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and d/b/a Ridge Crest Farms, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENT RETTEW ASSOCIATES, INC.

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Honorable Court consider whether Pennsylvania violates the Due Process Clause, Equal Protection Clause or Privileges and Immunities Clause of the United States Constitution by distinguishing between the living and the dead with respect to the application of its common law discovery rule to toll its state created statute of limitations for personal injury actions?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Rettew Associates, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER STATEMENT OF THE CASE

In February 2003, nearly eight years after the 1995 death of their son, the Petitioners, Russell Pennock and Antoinette Pennock, filed wrongful death and survival actions in the Pennsylvania Court of Common Pleas of Dauphin County. They sued both individually and on behalf of their son's estate.

The Complaint asserts that Petitioners' son passed away on April 1, 1995, as a result of rotavirus and staph infections that he contracted from his exposure to toxins contained in sewage sludge that was spread, pursuant to permits, on neighboring farmland. (Complaint, ¶¶13, 65, 66, 68.) Petitioners contend that they did not learn of the dangers associated with exposure to sewage sludge and its potential connection to their son's death until February 2001 when they read a newspaper article on that issue (Complaint, ¶¶73, 74), though they admit in their Petition for a Writ of Certiorari ("Petition") that after their son's death they engaged an attorney to investigate their son's death. (Petition, p. 3). Petitioners do not claim in their Complaint that they *could* not have discovered this alleged connection within the two year statute of limitations, but rather allege only that they *did* not.[1]

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[1] Petitioners frame issues in their Petition from the perspective of a claimant that could not have discovered the injury or its cause, but neither the Complaint nor the Petition (which adds many factual assertions that are not of record) offers any explanation for why a qualified medical professional could not have determined within the statute of limitations how the Petitioners' son died.

Defendants Richard V. Lenzi, Carmine D. Lenzi, Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, Clarence D. Gelsinger and the Berks County Conservation District all filed preliminary objections to the Complaint on the basis that the claims are barred by Pennsylvania's two year statute of limitations for personal injury. 42 Pa.C.S.A. §5524(2). On October 14, 2003, the trial court issued a Memorandum Order sustaining the preliminary objections and dismissing the Complaint as against those defendants because the claims are barred by the statute of limitations. (Pet. App. C at 26a-27a).

Defendant Rettew Associates, Inc. ("Respondent"), also filed preliminary objections seeking dismissal of the Complaint for the failure to state a claim of negligence against Respondent and on the basis of the bar of the statute of limitations. On June 30, 2004, the Court of Common Pleas sustained Respondent's preliminary objections and dismissed the Complaint. The Court further refused to grant Petitioners leave to amend the Complaint because it concluded that the two year statute of limitations barred Petitioners' claim against Respondent. (Pet. App. B at 17a, 24a-25a).

On September 15, 2005, the trial court's orders dismissing the Complaint were upheld by the Commonwealth Court of Pennsylvania. (Pet. App. A). On April 19, 2006, the Supreme Court of Pennsylvania denied Petitioners' Petition for Allowance of Appeal. (Pet. App. D).

SUMMARY OF THE ARGUMENT

The application of a state statute of limitations to a state created right of action for wrongful death and survival is not an issue that places this case among the select group of cases in which certiorari discretion should be exercised.

Pennsylvania's refusal to defer accrual of the statute of limitations to wrongful death and survival actions is a well considered and eminently rational decision that implicates no federal constitutional rights.

REASONS FOR DENYING THE PETITION

A. None of the Considerations Governing Review on Writ of Certiorari are Applicable

Review on a writ of certiorari is a matter of judicial discretion, not of right, that is granted only for "compelling reasons". Sup.Ct.R. 10. Rule 10 identifies the considerations that define an appropriate candidate for review upon writ of certiorari.

Petitioners base their Petition upon subsection (c) of Rule 10, which addresses cases in which "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Petitioners argue that the "Commonwealth Court of Pennsylvania has decided an important federal question of constitutional law that has not been, but should be settled by this Court", which they frame as follows: "Does the

Fourteenth Amendment require states to apply the discovery rule to the statute of limitations when the plaintiff could not, with the exercise of reasonable diligence, know the facts of both injury and causation within the statutory time limit?" (Pet., pp. 10-11)[2].

Petitioners misstate the issue being presented to this Court. Pennsylvania applies a discovery rule to actions for bodily injury filed by living plaintiffs. It finds, however, that

[2] Although this is the only declared basis for the Petition, Petitioners also mention in two footnotes that the states are split on whether "extinguishing claims without the benefit of the discovery rule violates due process" and "equal protection." (Pet. pp. 14-17, n. 7 and 8). Thus, it appears that Petitioners may be asserting that Rule 10(b) also applies in that the Pennsylvania Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort. However, of the 32 cases cited in these footnotes, the descriptions of the cases provided by Petitioners show that only one case appears to come close to confronting the issue presented to the Pennsylvania Supreme Court in *Pastierik*. That case, *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz. App. 1987), was a decision by the Arizona Court of Appeals and not the Arizona Supreme Court and therefore Rule 10(b) would not apply. Even so, the *Anson* case does not support Petitioners' cause. The *Anson* opinion does not address whether the application of the discovery rule to personal injury actions and not wrongful death actions violates the Fourteenth Amendment of the United States Constitution. Instead, *Anson* is confined to the question of whether the accrual provision of the Arizona statute of limitations for products liability actions violates the Arizona Constitution. The Arizona Constitution contains pertinent provisions not found in the United States Constitution, including that "[n]o law shall be enacted in this state limiting the amount of damage to be recovered for causing the death or injury of any person" and "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." *Anson*, 747 P.2d at 583-87.

it is unwise to defer the accrual of a cause of action for wrongful death/ survival because entirely different considerations exist when the injured party is dead. The Petitioners contend that it is unconstitutional for Pennsylvania to distinguish between the living and the dead with respect to determining when the statute of limitations begins to run for claims related to bodily harm. Although Petitioners contend that the manner by which Pennsylvania applies of its common law "discovery rule" to state created causes of action related to bodily harm implicates constitutional concerns, it does not. What is presented to this Court is a matter of Pennsylvania law that does not merit review by the nation's highest Court.

B. This is Not an Appropriate Case for this Honorable Court's Review

Petitioners brought an action for wrongful death and survival almost eight years after the death of their son. The statute of limitations in Pennsylvania for wrongful death actions is two years. 42 Pa. C.S.A. §5524. The two year period is computed from the "time the cause of action accrued." 42 Pa.C.S.A. §5502(a). Petitioners argued before the Pennsylvania state courts that the common law "discovery rule" should have been applied to their claim thereby tolling the statute of limitations until Petitioners could, with reasonable diligence, discover the cause of their son's death. However, the Pennsylvania Supreme Court in *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987), has clearly held that the discovery rule does not apply to wrongful death or survival actions. Accordingly, Petitioners' action was dismissed on preliminary objections based upon the expiration of the two year statute of limitations.

Petitioners ask this Court to find that the Pennsylvania Supreme Court's refusal to apply the Pennsylvania "discovery rule" to toll the statute of limitations for claims of wrongful death and survival, violates the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution. Petitioners argue that there is no basis to distinguish, for purposes of the application of the discovery rule, between decedents and living plaintiffs. Notably, Petitioners failed to explore in detail Pennsylvania's "discovery rule" and its pleading rules in their Petition. Had they done so, it would be evident that this case does not merit this Court's review.

In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. *Fine v. Checcio*, 870 A.2d 850, 857 (Pa. 2005). The statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Id.* Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. *Id.* Mistake, misunderstanding, or lack of knowledge do not toll the running of the statute. *Id.* As a general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). Moreover, as the Pennsylvania Supreme Court has said, "'[t]here are [very] few facts which diligence cannot discover. . . .'" *Fine*, 870 A.2d at 858 (citations omitted).

The discovery rule is a judicially created exception to the statute of limitations originating in cases in which the

injury or its cause was neither known nor reasonably knowable, despite the exercise of reasonable diligence. *Id.* at 858.

> The purpose of the discovery rule has been to exclude from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury is reasonably unaware that he had been injured, so that he has essentially the same rights as those who have suffered such an injury.

Id. When the discovery rule applies, the statute of limitations is tolled and does not being to run until the injured party discovers or reasonably should discover, that he has been injured and that his injury has been caused by another party's conduct. *Id.* at 859.

Petitioners do not allege in their Complaint that they could not have discovered the alleged cause of their son's death within the two year statute of limitations period. Instead, they aver simply that they "first became aware of the dangers associated with exposure to sewage sludge in February of 2001."[3] (Complaint, ¶73). After the review of their son's medical records by Dr. David L. Lewis, it was determined that his rotavirus and staph infections were caused by his prolonged exposure to the dust and fumes emitted

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[3] Pennsylvania is a fact pleading jurisdiction requiring that the Complaint contain all the material facts upon which a claim is based. Pa.R.Civ.P. 1019(a). Accordingly, Petitioners were required to plead all facts establishing their right to maintain their claim despite the passage of the two year statute of limitations.

from the pathogens found in Class B sewage sludge.[4] (Complaint, ¶¶ 66 and 68).

However, Petitioners never plead and never assert that the alleged cause of their son's death could not have been discovered within the statute of limitations had they acted with reasonable diligence to investigate the cause of his death. They do not allege that breakthroughs in science or scientific testing account for why their son's alleged cause of death could be not be determined until 2001, as opposed to 1995, 1996 or 1997. Indeed, Petitioners admit in their Petition that they were told by their son's doctors that he died of staphylococcus aurea and rotavirus infections, that the circumstances of his death alerted them to the need to investigate it, and that they engaged an attorney to conduct an investigation. (Pet., p. 3). Thus, Petitioners did in fact conduct an investigation into their son's death, and there is no basis to conclude that had Dr. Lewis or some other qualified doctor reviewed their son's records within two years of his death, Petitioners would not have discovered the alleged cause of their son's infections and subsequent death within the statutory period. The record in this matter fails to disclose the assertion by the Petitioners of the crucial element necessary to support the application of the discovery rule to their patently untimely filing of their claims. Accordingly, based upon the pleadings, this matter is not one to which the discovery rule would apply in any event, and therefore, this matter is not appropriate for this Court's review. The Court should deny the writ.

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[4] Although not explicitly pled, this review and analysis by Dr. Lewis must have been done sometime after February 2001 as Petitioners aver that they became aware of Dr. Lewis after reading an article in February 2001 about sewage sludge which mentioned Dr. Lewis as an expert in that field. (Complaint, ¶¶73-78).

C. The Decision of the Supreme Court of Pennsylvania in *Pastierik* Does Not Violate the Equal Protection Clause, Due Process Clause, or the Privileges and Immunities Clause of the United States Constitution.

The issue presented by Petitioners is an issue of state law that does not implicate any provisions of the United States Constitution. The deficiencies in each of Petitioners' constitutional claims are addressed below.

1. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners argue that the Pennsylvania Supreme Court's decision in *Pastierik* permitting application of the Pennsylvania discovery rule to toll the statute of limitations for living personal injury plaintiffs but precluding its application for deceased plaintiffs asserting wrongful death claims, violates the Equal Protection Clause of the United States Constitution. Petitioners are incorrect; the distinction made in *Pastierik* satisfies the requirements of equal protection under the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. Petitioners attempt to argue that the issue they have raised involves a fundamental right of access to the courts requiring strict scrutiny review, but it does not. Petitioners have not been denied access to the courts of Pennsylvania. To the contrary, they had two years from the date of their son's death

in which to bring their wrongful death claim. The Pennsylvania Supreme Court's decision in *Pastierik* merely enforces the statutory time limit created by the Pennsylvania legislature in which such claims must be brought. The refusal to apply the discovery rule to defer accrual of wrongful death and survival actions therefore does not affect a fundamental right. *See Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945) (stating that "statutes of limitation go to matters of remedy, not to destruction of fundamental rights."); *see also, Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555-56 (3d Cir. 1985)(treating claim of denial of access to courts under rational basis review); *Gravinese v. Johns-Manville Corp.*, 471 A.2d 1233, 1238 (Pa. Super. 1984) ("Subject only to the rule that a reasonable time to sue must be allowed, statutes of limitations pertain to remedies and do no impair fundamental rights."). [5] Thus, the allegedly unfair distinction between the living and the dead with respect to the application of the discovery rule to the statute of limitations is subject to the least exacting scrutiny provided by the rational basis test. *See*, *Heller v. Doe*, 509 U.S. 312, 319-320 (1993) (classifications that involve neither a fundamental right nor proceed along suspect lines are subject to rational basis review). Under the rational basis test, any distinction made that is rationally related to a legitimate government interest does not violate equal protection. *Ciccarelli*, 757 F.2d at 555-56 *citing United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). This Court has acknowledged that statutes of limitations serve an important state interest by preventing a

[5] Further, this Court has held that the right to sue for wrongful death of another is not considered a "fundamental" or constitutional right. *Parham v. Hughes*, 441 U.S. 347, 358 n.12 (1979) ("It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right.").

plaintiff from sleeping on his rights "until evidence has been lost, memories have faded, and witnesses have disappeared." *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944).

The Pennsylvania Supreme Court's holding that the discovery rule does not apply to wrongful death/survival actions but does apply to personal injury actions pursued by living plaintiffs is rationally related to the state's important interest in preventing stale claims and prejudice to the alleged tortfeasor that accompanies such stale claims. The Pennsylvania Supreme Court has articulated its basis for distinguishing between the living and the dead with respect to the application of the discovery rule with sufficient clarity and force to survive any level of scrutiny, but it certainly meets the test of rationality.

In 1981, the Pennsylvania Supreme Court held in a plurality opinion that the statute of limitations for a wrongful death action can not be tolled by the discovery rule.[6] *Anthony v. Koppers Company*, 436 A.2d 181, 183-84 (Pa. 1981). The Court's carefully considered rationale for the distinction was that:

> Statutory references to the occurrence of an "injury" or the accrual of a "cause of action" are subject to judicial interpretation as to the degree of knowledge a plaintiff must possess before

[6] The statute of limitations for wrongful death actions at the time *Anthony* was decided was the precursor to the present statute. It provided that "the [wrongful death] action shall be brought within one year after the death, and not thereafter." *Anthony*, 436 A.2d at 183. The statute for such actions is now two years. 42 Pa.C.S.A. §5524(2).

> the statute will start to run. In contrast, the requirement that a wrongful death action be brought within [a certain period of time] after a definitely established event, — "death"— leaves no room for construction.

Anthony, 436 A.2d at 184. The same rule applies to survival actions because "survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action, which had already accrued to the deceased before his death." *Id.* at 185. Therefore, the statute of limitations to bring a survival action begins to run, at the latest, at the death of the plaintiff's decedent.

In *Pastierik*, the Pennsylvania Supreme Court reaffirmed its holdings in *Anthony*, again refusing to apply the discovery rule to wrongful death or survival actions. *Pastierik*, 526 A.2d at 327. In *Pastierik*, as in the present matter, the plaintiffs argued that the discovery rule should apply to both wrongful death actions and personal injury actions. The *Pastierik* Court rejected this argument, because extending the application of the discovery rule to wrongful death actions would "greatly expand, theoretically to infinity, the time period during which wrongful death actions could be brought." *Id.* at 325-26. The Court did not "believe that such was the intent of the legislature in enacting 42 Pa.C.S.A. §5502(a), for while the concept of accrual may have usefulness in delaying the point at which the statute of limitations begins to run with respect to injuries, . . . because injuries are of a nature that they may be inflicted without immediate symptoms or immediately determinable causes, causes of action for death must be regarded in a different light since they are not similarly shrouded by indefinite factors." *Id.* at 326 (citations omitted).

Because "'death' is a 'definitely established event,'" "survivors are immediately put on notice that they may proceed to determine the cause of death" and "there is no basis to regard the cause of action for death as accruing at any time other than at death." *Id.* "Upon the death of an individual, survivors are put on clear notice thereof, and they have the opportunity to proceed with scientific examinations aimed at determining the exact cause of death so that a wrongful death action, if warranted, can be filed without additional delay." *Id.* [7] The Court recognized that such examinations, including autopsies, are "designed to make a final determination as to the cause of death, and they are not restrained or limited in their scope, as would be examinations of living persons. . . ." *Id.* For these well considered reasons, the Court reaffirmed *Anthony* and determined that the discovery rule is not needed in a wrongful death case to prevent the statute of limitations from working an injustice on a reasonably diligent plaintiff. Accordingly, the Court rejected the application of the discovery rule to wrongful death actions.[8] *Id.* at 326-27.

The legitimate purposes of statutes of limitations are furthered by the Pennsylvania Supreme Court's distinction between suits filed by the living and those filed on behalf of the dead with respect to the application of the Pennsylvania discovery rule. The Pennsylvania Supreme Court has not only

[7] This is, of course, exactly what the Petitioners admit happened in this case. They did investigate the cause of their son's death shortly after he passed away. They seek to be relieved from the consequences of an ineffective investigation.

[8] With respect to survival actions, the *Pastierik* Court agreed with the *Anthony* Court that a "'the survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action which has already accrued.'" *Id.* at 327.

articulated a rational basis for this long-held distinction, it has articulated a compelling basis to treat these categories of claimants differently, consistent with a reasonable goal of assuring that potential claims do not linger in perpetuity, and as such the Pennsylvania Supreme Court's decision in *Pastierik* and the principle of law set forth therein does not violate the Equal Protection Clause of the United States Constitution.

2. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners also argue that the *Pastierik* decision violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners do not challenge the constitutionality of the wrongful death statute of limitations itself, but rather the holding of *Pastierik* that the discovery rule is not applicable to wrongful death and survival actions.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that States shall not "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, §1. Although the Petition does not distinguish between the concepts of procedural and substantive due process, and Petitioners do not articulate the specific basis for their claim, it appears (based upon the case law cited by Petitioners) that Petitioners' claim is that they suffered a deprivation of their procedural due process rights. The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v.*

Roth, 408 U.S. 564, 569 (1972). Although also not articulated in the Petition, it appears Petitioners may be claiming a deprivation of a property interest grounded in the right to bring a cause of action for wrongful death. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (stating that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause).

The *Pastierik* decision does not violate the Due Process Clause. The Due Process Clause has been interpreted in plain terms to provide that the "State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434. However, as this Court has stated, "nothing we have said entitles every civil litigant to a hearing on the merits in every case," *id.* at 437, and "[t]his is not to suggest, of course, that the State must consider the merits of the claim when the claimant fails to comply with a reasonable procedural requirement, or fails to file a timely charge." *Id.* at 434 n. 7; *see Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (noting as an example that a State can enter a default judgment against a defendant, who, after adequate notice, fails to make a timely appearance). "The State remains free to create substantive defenses or immunities for use in adjudication — or to eliminate its statutorily created causes of action altogether. . . ." *Logan*, 455 U.S. at 432. In such circumstances, the legislative determination provides all the process that is due. *Id.* at 433. Moreover, "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, . . . or, in an appropriate case, filing fees. . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Id.* at 437 (citations omitted).

Further, the Third Circuit, citing to this Court for support, has addressed the issue Petitioners raise in the context of the Pennsylvania statute of limitations for wrongful death and the application of same by the *Pastierik* Court and found no violation. As the Third Circuit explained, "[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access — a reasonable opportunity to be heard." *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554-55 (3d Cir. 1985), *citing Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

The *Ciccarelli* Court found that the Pennsylvania Supreme Court's decision in *Pastierik* with respect to its application of the statute of limitations does not violate the plaintiffs' due process rights. *Ciccarelli*, 757 F.2d at 555. In reaching its decision, as part of its reasoning, the Third Circuit quoted from this Court in *United States v. Kubrick*, 444 U.S. 111 (1979):

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. [(11 Otto] 135, 139 [25 L.Ed. 807] (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 88 L.Ed. 788, 64 S.Ct. 582 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having

> to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322 n. 14, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 13 L.Ed. 2d 941, 85 S.Ct. 1050 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945); *Missouri, K. & T.R. Co. v. Harriman*, 227 U.S. 657, 57 L.Ed. 690, 33 S.Ct. 397 (1913); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 L.Ed. 174 (1828).

Ciccarelli, 757 F.2d at 555, quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979). As pointed out by the *Ciccarelli* Court this Court has also recognized that statutes of limitations:

> are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Ciccarelli, 757 F.2d at 555, quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Because statutes of

limitations are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury or before he knows he has sustained an injury, but such " a statute does not violate due process if the limitation period is otherwise reasonable." *Id.* at 555. The *Ciccarelli* Court concluded that the *Pastierik* Court's interpretation and application of the statute of limitations to wrongful death/ survival actions did not violate due process because the time period provided by the legislature was reasonable. *Id.* at 555.

In the present matter, Petitioners' complaints regarding the constitutionality of the *Pastierik* decision are unfounded. All that the *Pastierik* Court did was enforce the two year statute of limitations for wrongful death that was enacted by the Pennsylvania legislature. Petitioners do not argue, nor could they, that the time period provided by the statute was not reasonable. Accordingly, Petitioners do not have any claim for deprivation of their procedural due process rights by virtue of the ruling of the Pennsylvania Supreme Court in *Pastierik* and their Petition should be denied.

3. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Privileges and Immunities Clause of the United States Constitution.

The right of access to the courts is analyzed under the Privileges and Immunities Clause of Article IV, §2, of the United States Constitution. *Warren v. Harbury*, 536 U.S. 403, 415, n.12 (2002); *Baldwin v. Fish and Game Commission of Montana, et al.*, 436 U.S. 371, 383 (1978).[9] "When the

[9] Petitioners incorrectly maintain that the right of access to state courts is a privilege of citizens of the United States under the Privileges and Immunities Clause of the Fourteenth Amendment. Petitioners cite no case law that so holds.

Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in . . . access to the court of the State." *Baldwin*, 436 U.S. at 383. That is not the situation that exists in the present case. Pennsylvania's discovery rule, as applied to wrongful death/survival actions, imposes no such burden.

Petitioners are Pennsylvania citizens suing in a Pennsylvania state court, and they cannot and do not claim to have been denied access to the courts because they are citizens of some other state. Instead, they repeat the same argument that they made to support their untenable due process claims, which is that the Pennsylvania Supreme Court's decision with respect to the application of the Pennsylvania discovery rule to their wrongful death / survival action has improperly denied them access to the courts. That is a right the Privileges and Immunities clause is not designed to protect. Moreover, the Clause applies to only those "'privileges' and 'immunities' bearing upon the vitality of the Nation." *Baldwin*, 436 U.S. at 383. Certainly it cannot be said that the Pennsylvania Supreme Court's refusal to apply its common law discovery rule to wrongful death actions depletes the vitality of the nation.

Petitioners have failed to establish a violation of the Privileges and Immunities Clause of the United States Constitution and their Petition should be denied.

CONCLUSION

Petitioners had two years from the date of the death of their son to investigate and determine the cause of his death and to bring suit thereon, if warranted. Petitioners were clearly on notice of potential claims and they conducted an investigation which simply failed to yield relevant scientific information in time for them to pursue litigation under the law of Pennsylvania. Petitioners did not plead that they could not with reasonable diligence have discovered the alleged cause of their son's death within the two year statute of limitations, and they offer in their Petition no reason why they could not have done so. The United States Constitution does not require that causes of action survive indefinitely. Petitioners had a reasonable right of access to the courts and a reasonable opportunity to be heard. Petitioners present for this Court's consideration an issue of interpretation and application of Pennsylvania law governing the accrual of wrongful death actions that does not implicate any provisions of the United States Constitution. This matter does not merit the attention of the nation's highest court. For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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